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Before The FEDERAL COMMUNICATIONS COMMISSION RECEIVED Washington, D.C. 20554

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		FEDERAL COMMUNICATIONS COMMISSION
In the Matter of)	OFFICE OF SECRETARY
Rulemaking to Amend Parts 1, 2, 21 and 25)	CC Docket No. 92-297
of the Commission's Rules to Redesignate the)	
27.5-29.5 GHz Frequency Band, to Reallocate)	
the 29.5-30.0 GHz Frequency Band, to)	
Establish Rules and Policies for Local Multipoint)	
Distribution Service and Fixed Satellite Services)	

JOINT COMMENTS OF BELL ATLANTIC CORPORATION AND SBC COMMUNICATIONS INC.

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Bell Atlantic Corporation and SBC Communications Inc. submit these comments in response to the <u>Fourth Notice of Proposed Rulemaking</u> (FCC 96-311, released July 22, 1996).

SUMMARY

In its Report and Order which accompanied the Fourth Notice, the Commission allocated spectrum in the 28 GHz band for the new Local Multipoint Distribution Service (LMDS). The Fourth Notice seeks comment on whether to restrict the eligibility of incumbent local exchange carriers and cable operators to acquire LMDS licenses in their service areas, or whether to restrict these parties in their use of LMDS spectrum. Bell Atlantic and SBC oppose any restrictions on eligibility or use.

First, in many other recent rulemaking proceedings, the Commission has

held that expediting new services and ensuring that they are put to the highest and best use requires open eligibility. There is no basis to distinguish LMDS from these other new radio services, and no ground to impose blanket barriers on which parties may compete for LMDS licenses.

Second, enactment of the 1996 Telecommunications Act confirms that open eligibility for LMDS licenses is the right decision. Congress' elimination of entry barriers, its encouragement of LEC investment in the video market, and its decision to promote competition for new services all support unrestricted eligibility for LMDS licenses.

Third, in earlier notices in this proceeding, the Commission raised this same issue. The overwhelming response of commenters was in favor of open eligibility. The record demonstrates the pro-competitive and other benefits of allowing all providers to compete for new radio licenses. The claim of a few commenters that they are entitled to be "protected" by limiting eligibility is undermined by the fact that they are free to compete in the telecommunications markets in multiple ways.

Fourth, permitting LECs to acquire LMDS spectrum even in their own service areas would advance the Commission's often-stated goal of promoting new competition in video services. The Commission has recognized that LECs can present a competitive challenge to incumbent cable systems, and it now acknowledges that LMDS is well-suited to video/broadband technologies. Keeping LECs out of LMDS would undermine the Commission's own pro-competitive policies for video services.

Fifth, the proposed LMDS usage restrictions are neither necessary nor advisable. Aside from the many problems and complexities in designing and enforcing rules that micromanage a carrier's particular use of spectrum, usage rules would conflict with the Commission's policy of flexible use for wireless services, and would replace market-driven determinations of what licensees offer with government fiat.

Bell Atlantic and SBC thus urge the Commission to reaffirm its open eligibility and usage policies, and apply them to LMDS spectrum.

I. THE COMMISSION HAS CONSISTENTLY FOLLOWED AN "OPEN ENTRY" POLICY FOR NEW WIRELESS SERVICES.

Over the past several years the Commission has created multiple radio services. In each of the rulemakings to set the licensing rules for these new services, the Commission has followed an "open entry" policy, in which few restrictions are placed on who can obtain these licenses, other than those set forth in the Communications Act. It has not precluded existing telecommunications carriers generally, nor incumbent local exchange carriers in particular, from competing for the right to offer those new services. Nor has it constrained the manner in which LECs may use a license to serve subscribers. The Commission has repeatedly stated that this policy of open eligibility serves the public interest

¹For example, Section 310(b) of the Communications Act places limits on foreign ownership of radio stations, and these limits are incorporated into the eligibility rules for the new radio services.

by maximizing the "highest and best use" of spectrum. That same policy, and the reasons underlying it, apply equally to LMDS.

PCS. When it proposed licensing rules for broadband PCS, the Commission flagged some of the same concerns as to LEC eligibility which the Fourth Notice now raises with regard to LMDS. It noted that PCS can be both a competitive and a complementary service to conventional landline service, and that LEC ownership of PCS systems could provide incentives for LECs to discriminate against competitors.² After receiving extensive comments on eligibility, the Commission adopted rules enabling LECs to acquire PCS licenses, based on its conclusion that LEC participation would have "public interest benefits." For example, "allowing LECs to participate in PCS may produce significant economies of scope between wireline and PCS networks," and these economies "will promote more rapid development of PCS and will yield a broader range of PCS services at lower costs to consumers."

MMDS. The Commission created new geographic MMDS licensing procedures for the Multichannel Multipoint Distribution Service to promote

²Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Red 5676, 5705 (1992).

³Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order ("PCS Order"), 8 FCC Rcd 7700, 7751-52.

⁴<u>Id.</u> The Commission also allowed LECs to acquire narrowband PCS licenses without restriction. <u>Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services</u>, <u>First Report and Order</u>, 8 FCC Rcd 7162, 7167 (1993).

development of that service as an alternative to incumbent cable operators.⁵

It allowed telephone companies to bid for these MMDS licenses, regardless of whether the MMDS license area overlapped the telco's service area.

GWCS. The Commission created the General Wireless Communications

Service from new spectrum in the 4.6 GHz band.⁶ GWCS licensees will be able to provide a wide range of both fixed and mobile services, including dispatch, microwave, and wireless local loop, in competition with (or as a complement to) existing landline and wireless telecommunications services. The Commission decided to impose no eligibility restrictions: "Opening the GWCS market to a wide range of applicants will permit and encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure the highest and best use of this spectrum."

<u>DBS</u>. In revising its rules for the Direct Broadcast Satellite Service, the Commission did not impose any eligibility restrictions, even on cable operators, despite concluding that the service would directly compete with incumbent cable systems.⁸

⁵Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service Report and Order, 10 FCC Rcd 9569 (1995).

⁶Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, Second Report and Order, 11 FCC Rcd 624 (1995).

⁷Id. at 649.

⁸Revision of Rules and Policies for the Direct Broadcast Satellite Service. Report and Order ("DBS Order"), 1 CR 928 (1995).

MSS. The Commission similarly did not restrict eligibility for seeking a license in the Mobile Satellite Service. This service will provide voice and data telecommunications that may compete with existing landline networks.⁹

The preference for open eligibility is even more compelling when, as here, the Commission intends to conduct auctions to award LMDS licenses. Open eligibility encourages maximum participation in auctions, thereby encouraging a bidding process which recovers full value from licensing the spectrum.

These same principles of unrestricted eligibility generally and LEC eligibility in particular apply equally to LMDS. There is no basis to distinguish LMDS from one or more of the other services the Commission has authorized. Like PCS, LMDS may provide two-way voice and data services. Like MMDS, it may transmit video. Just as the Commission decided to open these new services to full competition for licenses, it should do so for LMDS. Imposing entry barriers on LMDS would backtrack on the consistent, and correct, policies which have been applied to other wireless services.

II. THE 1996 TELECOMMUNICATIONS ACT CONFIRMS THAT OPEN ELIGIBILITY IS THE RIGHT POLICY.

The <u>Fourth Notice</u> asks how the Telecommunications Act of 1996 should affect the issue of LEC and cable eligibility to bid for LMDS licenses. The Act

⁹Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd 5936 (1994).

clearly supports open entry generally, and entry of LECs into video services such as LMDS in particular. Restrictions on eligibility would be inconsistent with the Act's objectives.

One of Congress's fundamental goals in enacting the 1996 Act was to decompartmentalize the telecommunications industry. Over time, different types of telecommunications services had been restricted to certain providers, and thus protected from competition. In Section 254 and other provisions of the 1996 Act, Congress eradicated the market entry barriers that inhibited competition.

Congress specifically recognized the benefits of LEC entry into the video programming market through LMDS and other services by promoting such entry. Section 301(b)(3) of the 1996 Act amends Section 623(l)(1) of the Communications Act, to add to the definition of "effective competition" situations where "a local exchange carrier or its affiliate . . . offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator." LEC provision of video programming was not limited to wireline open video systems. In summarizing this new provision, the Conference Report on the 1996 Act stated: "By any means" includes any medium (other than direct-to-home satellite service) for the delivery of comparable programming, including MMDS, LMDS, and open video systems, or a cable system." And, in discussing new Section 653 of the Act for open video

¹⁰Conf. Rep. No. 104-458, 104th Cong., 2d Sess. (1995) at 170 (emphasis added).

systems, the Conference Report stated, "The conferees recognize that telephone companies need to be able to choose from among multiple video entry options to encourage entry"¹¹

The 1996 Act supports open eligibility for LMDS in other ways. Its provisions opening up the local exchange market enable those who want to offer competitive local telecommunications services multiple ways to do so. Section 251 and other provisions entitle competitive local exchange carriers (CLECs) to obtain the elements of LECs' networks they need to complete their own networks. In addition, or as an alternative, they may purchase LEC services at a discounted price in order to engage in resale. There is thus no basis for a claim that LMDS needs to be reserved for LEC competitors in order for them to compete. CLECs are already competing, and the 1996 Act and its implementation by the Commission and the states will stimulate even more competition.

The Commission's prior orders creating new wireless services, many of which can be used for local telecommunications, did not foreclose LEC eligibility, even though these orders were adopted prior to the 1996 Act. Now that Congress has mandated local competition, and competition is already occurring, there is

¹¹Id. at 177.

¹²The <u>Fourth Notice</u> (at ¶ 126) asks, "Do LMDS licenses represent a unique and necessary resource for de-concentrating the market power of incumbent LECs and cable operators?" Clearly not. The two-way voice and data capabilities of LMDS can also be provided by other wireless services such as PCS, GWCS and cellular, and CLECs can seek those licenses, as well as enter the local exchange market either through constructing their own facilities or through resale.

even less basis for blocking LEC entry.

Where Congress wanted there to be exceptions to its policy on unrestricted entry, it said so. For example, in the 1992 Cable Act and the 1996 Act, it wrote detailed provisions governing cross-ownership. See Section 613 of the 1992 Act and Section 652 of the 1996 Act. On neither occasion, however, did it impose any constraints on LECs ownership of wireless services. Congress' actions indicate not only Congressional intent not to restrict LEC investment in new wireless services, but an affirmative mandate to allow all competitors to compete for licenses to offer wireless services.

III. THE RECORD STRONGLY SUPPORTS PERMITTING ALL INTERESTED PARTIES TO BID FOR LMDS.

The Commission is not writing on a clean slate here; the <u>Fourth Notice</u> references the many comments in the record which advocate open eligibility requirements for LMDS. The overwhelming number of commenters expressly supported LEC eligibility noting numerous benefits and advantages to doing so.¹³ They observe that open entry will expedite service by allowing experienced carriers to obtain licenses, and will permit existing carriers to achieve efficiencies and economies of scale. These advantages were cited and relied on by the Commission in permitting LECs to bid for PCS. They are equally applicable here.

¹³E.g., Comments of Bell Atlantic at 5-7; Comments of NYNEX at 2; Comments of Texas Instruments at 17-18, Comments of BellSouth at 6-8, Comments of Pacific Telesis at 2; Comments of NCTA at 2-7

The few opposing commenters contend that allowing free entry may reduce the likelihood that LMDS will become competitive. They advance no facts or economic analysis to support this speculation, nor do they advance any grounds for the Commission to depart from its previous open entry policy here. And, given the multiple wireless technologies which have been or are being licensed and which are available to any party which seeks to provide service, no single entity will be able to obtain and exert market power in any relevant market through an LMDS license. In any event, Congress has already determined that open entry is the right policy, and that insulating some providers against competition from others is the wrong one.

Moreover, the same argument that new spectrum should be reserved for new players only was made, and rejected, in the recent DBS rulemaking. Some parties argued that, because cable already had substantial market power in the video market, it should not be able to compete for DBS licenses. The Commission disagreed, finding that allowing incumbent cable operators to acquire DBS licenses served the public interest, even if they possessed substantial or monopoly power in certain geographic areas. ⁴ Having determined that players as dominant as cable operators can bid for another video service, the Commission could not properly determine here that LECs cannot bid for another service.

Opponents of free entry also argue that it might prevent small businesses from acquiring spectrum. The Commission has also considered and rejected this

¹⁴DBS Order, supra r. 8 at 948-49.

ground for entry barriers in the PCS rulemakings. If the Commission decides that small businesses should receive advantages in competing for LMDS spectrum, it can achieve those goals by offering bidding credits, installment payment arrangements, and other benefits. It does not need to impose rigid entry barriers in order to promote small business involvement in LMDS.

IV. RESTRICTING LEC ELIGIBILITY WILL IMPAIR DEVELOPMENT OF COMPETITION TO CABLE.

Permitting LECs to acquire LMDS spectrum would advance the Commission's often-stated goal of promoting new competition in video services. Conversely, precluding LECs from doing so will undermine that goal.

In both the 1992 Cable Act and the 1996 Telecommunications Act, Congress has sought to promote competition in video programming services by encouraging investment in new video technologies. The Commission has consistently declared that its cardinal policy in the video market is to foster added competition to incumbent cable operators. In its most recent assessment of competition in the

¹⁵ "An essential element of the 1992 Cable Act is promoting increased competition and diversity by fostering the development of alternative multichannel video programming distributors." Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Notice of Proposed Rulemaking, 9 FCC Rcd 7665, 7667 n. 7 (1994) ("MMDS BTA NPRM")

¹⁶"An essential component of competition is choice. As we recognized in our recent report to Congress, consumers in the market for video programming do not have enough choices. . . . This rulemaking is one of several administrative improvements directed toward enhancing the development of wireless cable operators as viable competitors in the video programming marketplace." MMDS

multichannel video services market, however, the Commission found competition to cable from other technologies is still lacking.¹⁷

To promote competition in the video market, the Commission has made major revisions to the MMDS licensing system, to encourage investments in that technology so that it can become a viable competitor to cable. LECs are not only allowed to bid for MMDS channels; the Commission has encouraged this and has pointed to the investment of LECs in MMDS as a pro-competitive development.¹⁸

The Commission's creation of LMDS has similarly been based on its desire to develop another wireless technology that can compete with cable. LMDS has an advantage over MMDS in that the amount of spectrum being allocated is many times that available to MMDS. Commenters in this proceeding have also focused on the video/broadband capabilities of LMDS, seeing it primarily as a potential competitor to cable. But the Commission has recognized that the need for

BTA NPRM, supra n. 15, at 7666.

¹⁷"Although competitive pressures from alternative video distributors are increasing, the Commission concludes that markets for the distribution of video programming are not yet competitive. Most video distribution markets continue to be highly concentrated, and incumbent cable operators face direct competition from overbuiders in only a few markets. . . . Despite the growth of DBS and wireless cable subscribership in the past year, competitive rivalry in most local video programming distribution markets is insufficient to constrain the market power of incumbent cable systems." Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, 11 FCC Rcd 2060, 2150, 2158 (1995).

¹⁸Id. at 2108-09, 2158

¹⁹See, e.g., Reply Comments of Texas Instruments, Inc., at 12 (1 GHz needed to compete with other MVDS providers); Comments of M3 Illinois Telecommunications Corp. at 2; Comments of Titan Information Systems Corp. at 3.

substantial investment, and the financial resources to make that investment, drives evolution of new services. Given the problems that have plagued MMDS, LMDS's primary pro-competitive function may be to offer a more viable alternative to cable.

Given the goal of promoting competition to cable, LMDS's position as a potential competitive service, and the role LECs can play in transforming that potential into reality, it would make no sense to foreclose LEC investment in LMDS.

V. USAGE RESTRICTIONS SHOULD NOT BE IMPOSED.

Assuming that the Commission adopts an open entry policy for LMDS eligibility, the <u>Fourth Notice</u> (at ¶ 131) asks whether there should be usage restrictions on LECs and cable operators which would, for example, prohibit certain service offerings by certain types of licensees.

Bell Atlantic and SBC oppose any usage restrictions. The <u>Fourth Notice</u> (at ¶ 125) acknowledges that "it is not possible to identify all potential uses of LMDS", and the accompanying <u>Report and Order</u> notes that LMDS will be able to provide an unlimited variety of existing and as yet undeveloped services to the public. Given that uses for LMDS are not even yet known, attempting to draft rules that restrict those uses would be as futile as it would be unwarranted. For example, the concept of limiting LECs to a "certain percentage of non-video programming" (<u>Fourth Notice</u> at ¶ 131) raises innumerable problems: How would

"non-video" programming be defined? How would percentage limits work? Since the Commission has found it to be in the public interest for LECs to be able offer complementary services via PCS,²⁰ why should a LEC be prohibited from offering them via LMDS?

The Commission itself has rejected the concept of such restrictions in numerous rulemakings for other radio services, even for services which are established. It would make even less sense to consider usage restrictions for a new service which, as the Commission acknowledges, how it will be used cannot yet be determined.

Just this month, the Commission refused to regulate the ways in which cellular and other CMRS carriers may use spectrum. At issue was whether there should be constraints on the mixture and types of mobile and fixed services that mobile carriers can offer. The Commission held:

We conclude that licensees should have maximum flexibility to provide fixed or mobile services or combinations of the two over spectrum allocated for CMRS services, including PCS, cellular and SMR services. We agree with the majority of commenters that limitations on fixed uses are unnecessary because the market is the best predictor of the most desirable division of this spectrum. In light of the dynamic, evolving nature of the wireless industry, we are concerned that regulatory restrictions on use of the spectrum could impede carriers from anticipating what services customers most need, and could result in inefficient spectrum use and reduced technological innovation. Allowing service providers to offer all types of fixed, mobile and hybrid services in response to market demand will allow

²⁰See PCS Order, supra n. 3.

for more flexible responses to consumer demand, a greater diversity of services and combinations of services, and increased competition.²¹

LECs are eligible to provide CMRS, and many in fact do so. Yet the Commission did not impose any usage restrictions on LECs when they offer CMRS, even though it recognized that wireless services may provide competition to existing landline networks. There is no rational basis to treat LEC provision of LMDS differently.

The Commission followed the same unrestricted use policy in adopting rules for the new General Wireless Communications Service.²² There too, LECs were made eligible to apply for GWCS licenses in their landline service areas. There, too, the Commission recognized that GWCS spectrum may be used for voice, data and other services in competition with existing landline networks. Yet no usage restrictions were imposed. The Commission pointed to the harms of restricting uses, and found that unrestricted use would encourage efficient spectrum use, promote competition, encourage research and investment, and allow carriers to provide the services customers want:

The flexible GWCS approach should permit a range of qualified uses, including those preferred by each of the commenters, while permitting new technologies and services to emerge and encouraging

²¹Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996) at ¶ 19.

²²Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, Second Report and Order, 11 FCC Rcd 624 (1995).

efficient use of this spectrum. Each license will have the opportunity and the incentive to make efficient use of the spectrum license it obtains. A licensee will not be constrained to employ the spectrum for a single use.²³

The <u>Fourth Notice</u> advances no reason why LMDS presents any stronger case for usage restrictions than do cellular, PCS, SMR, or GWCS. Given that LMDS's potential is only beginning to be understood, and neither the Commission nor the industry is certain as to how it would evolve, imposing usage limits would be particularly unwarranted. They would force carriers to respond to regulatory constraints rather than consumer demands, frustrate innovation and investment, and undermine efficient spectrum use.

CONCLUSION

The Commission states that its allocation decision in this proceeding is "clearing the way" for licensing of LMDS. Report and Order at ¶ 2. LMDS cannot become a reality, however, until licensing rules are completed. Restricting either eligibility for or use of LMDS will require writing detailed rules which will likely delay their issuance, risk litigation, impair rapid licensing of the service, and frustrate investment in it. This will hamper LMDS's evolution as a competitor to

²³Id. at 631-32.

cable and as a technology for other wireless services. The Commission should affirm its open eligibility and flexible use policies, and apply them to LMDS, so that the auction and licensing process can begin.

Respectfully submitted,

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